United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original

76-6054

To be argued by
WARREN A. SCHNEIDER

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 76-6054

GIUSEPPE CATANZARO,
Plaintiff-Appellant,

—against—

CENTRAL GULF STEAMSHIP CORP.,
Defendant and Third-Party Plaintiff-Appellee,

—against—

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE THIRD-PARTY DEFENDANT-APPELLEE UNITED STATES OF AMERICA

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Issue Presented

Was the conduct of the Trial Judge such as to vitiate plaintiff's right to a fair trial?

Statement of the Case

This case involves a claim by plaintiff-appellant for personal injuries allegedly sustained on board defendant-

appellee's vessel GREEN FOREST on October 31, 1970 while the vessel was in Cam Ranh Bay, Republic of Vietnam. The shipowner impleaded the United States as a third-party defendant demanding indemnification in the event of recovery by the plaintiff. The case was tried to a jury before the Honorable Richard H. Levet, and the jury found in favor of the defendant-appellee. The third-party action was thereafter dismissed by the Court.

The GREEN FOREST was a vessel chartered to the United States for the carriage of ammunition to Vietnam. She had discharged a portion of her cargo at Cam Ranh and the local U.S. Army Command ordered her to move on very short notice on the afternoon of October 31 due to their belief that there was an impending enemy attack. When the vessel was moved, she was under the command of a United States Army pilot and assisted by a United States Army tug. Mr. Catanzaro was allegedly injured when struck by the forward spring line after this had been set free from the pier bollard. According to the evidence produced at trial, the line apparently became engaged on the king post of the Army tug for a very short period and the strain of the line created a whiplash affect allegedly striking both Mr. Catanzaro and another seaman on board the vessel. The jury's finding was that Catanzaro had not proven either negligence on the part of the shipowner or unseaworthiness of the vessel. It is submitted that this verdict is fully supported by the evidence.

ARGUMENT

The Government will respond to the points raised by appellant's counsel in the same order as set forth in his brief.

POINT I

The Trial Court's comments pertaining to appellant's expert witness did not create prejudicial error.

Appellant's counsel has devoted some five pages of his brief to pinpointing alleged deficiencies in Judge Levet's comments and handling of the case. In so doing, he has necessarily editorialized the transcript of close to 700 pages. By necessity, if we attempt to place these citations in context, the Government's brief would be inordinately long. Suffice it to say, a review of the entire transcript of the trial will show that undue emphasis has been placed by the appellant on certain comments taken out of context, ignoring the totality of the situation and the fact that the jury was made fully aware of plaintiff's case and accurately advised of his position. See *United States* v. *Weiss*, 491 F.2d 460, 468 (2d Cir. 1974), *cert. denied*, 419 U.S. 833 (1974). There is certainly nothing in the record of this trial to show that the jury was adversely influenced by any comment by the Court.

It is clear that a Federal judge is entitled to comment on the evidence so long as he does not impose his own opinions on the jury or assume the role of an advocate of either party. See *Spano* v. *Koninklijke Rotterdamsche Lloyd*, 472 F.2d 33 (2d Cir. 1973); *United States* v. *Tourine*, 428 F.2d 865 (2d Cir. 1970), *cert. denied sub nom Burtman, et al.* v. *United States*, 400 U.S. 1020 (1971), *rehearing denied*, 401 U.S. 966 (1971). It is also clear from an examination of the transcript that most of the allegedly prejudicial remarks cited by appellant occurred when the Judge was attempting to expedite the movement of the case. This Court has clearly held that it will not put obstacles in the trial judge's way when he exercises a judgment wisely in attempting to reduce calendar congestion and speed up the handling of

cases. See *Davis* v. *United Fruit Company*, 402 F.2d 328 (2d Cir. 1968), *cert. denied*, 393 U.S. 1085 (1969); *Winston* v. *Prudential Lines, Inc.*, 415 F.2d 619 (2d Cir. 1969), *cert. denied*, 397 U.S. 918 (1970); *Michelsen* v. *Moore-McCormack Lines, Inc.*, 429 F.2d 394 (2d Cir. 1970). There is certainly no cause to censure Judge Levet for his attempts to keep the case from being bogged down, especially when counsel had full opportunity to produce all his witnesses, to enter all the admissible evidence that he desired, and to fully argue his client's case to the jury.

Appellant's counsel has cited numerous cases substantiating his position. Certain of these cases reversed the trial court, but only in circumstances where the judge clearly stepped outside the bounds of proper conduct. Thus in *Quercia* v. *United States of America*, 289 U.S. 466 (1933), the judge accused the defendant of lying. Similar comments may be found in the trial judge's remarks in *Myers* v. *George*, 271 F.2d 168 (8th Cir. 1959). In *Travelers Insurance Company* v. *Ryan*, 416 F.2d 362 (5th Cir. 1969), the judge indicated to the jury his position on the ultimate issue. The appellant herein does not claim that Judge Levet was guilty of any of these faults, and certainly his allegedly prejudicial comments did not "make a mockery out of the trial." *Myers* v. *George*, *supra* at 174.

Appellant emphasizes one particular statement in the judge's charge to the jury concerning his expert witness. It is clear that the charge must be interpreted as a whole, not in individual parts. See *Sutton* v. *Public Service Interstate Transportation Co.*, 157 F.2d 947 (2d Cir. 1946); *Franks* v. *United States Lines Company*, 324 F.2d 126 (2d Cir. 1963). In reviewing the charge as a whole, it is clear that the Court adequately and accurately instructed the jury on all the aspects of plaintiff's claim,

and there has been no showing in this case that plaintiff was in any way prejudiced by this statement. The charge clearly stated that the jury had heard the expert's qualifications and it was their duty to determine whether or not the shipowner had exercised good seamanship under the hypothetical situation posed by plaintiff's counsel and clearly thereafter summarized by Judge Levet. Further, Judge Levet clearly advised the jury that it was to decide based on the evidence it heard, not on his summary of it, a procedure approved by this Court in *Radiation Dynamics, Inc.* v. *Goldmuntz*, 464 F.2d 876 (2d Cir. 1972).

POINT II

The Trial Court's refusal to permit plaintiff to engage new counsel was not a prejudicial abuse of discretion.

Appellant has admitted, and it is clearly the law, that the determination as to whether or not to grant plaintiff a continuance to substitute counsel during trial is within the sound discretion of the Court. See *United States* v. *Cook*, 487 F.2d 963 (9th Cir. 1973); *Grunewald* v. *Missouri Pacific Railroad Company*, 331 F.2d 983 (8th Cir. 1964). In that case Judge (now Justice) Blackmun cited with approval the Eighth Circuit decision in *Bowles* v. *Goebel*, 151 F.2d 671, 674 (8th Cir. 1945):

> Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the purpose for which the power exists . . . And the purpose of an appellate court in examining exercised discretion for abuse is not one of creating prescriptions and definitions for the curbing of judgment generally, but simply one of viewing the action taken in an immediate case in the relativeness of its entire situation to see whether it com-

> pels the conviction that there has not been a responsible exercise in a legal sense of official conscience on all the considerations involved in the situation.

A review of the extended discussion in chambers made at appellant's request for such a continuance shows that Judge Levet met this criterion, especially in view of the past history of appellant's relations with counsel and the time and expense involved in bringing witnesses into New York which would have to be repeated in the event of a retrial, with the obvious possibility that they would not be available in the future. See also *McDonnell* v. *Tabah*, 297 F.2d 731 (2d Cir. 1961) and *Butler* v. *United States*, 317 F.2d 249 (8th Cir. 1963).

POINT III

Defense counsel's remarks throughout the trial do not require reversal.

The rule on this aspect of the case is clearly set forth in *Twachtman* v. *Connelly*, 106 F.2d 501 (6th Cir. 1939), cited by appellant, that "the power to set aside verdict [sic] for misconduct of counsel should be sparingly exercised on appeal." Using that criterion, there appears to be nothing in the citations to Mr. Healey's arguments or review of his conduct throughout the trial, to indicate that this is one of those rare cases in which the Court should reverse. As this Court has stated in *Schwartz* v. *Northwest Airlines, Inc.*, 275 F.2d 846 (2d Cir. 1960), counsel must properly have some latitude in argument to a jury as long as no prejudice exists. It should also be noted, while appellant obviously does not emphasize this in his brief, plaintiff's counsel also was somewhat hyperbolic in his argument to the jury. In any event, any possible prejudice, which has not been shown, was cured by Judge

Levet's direction to the jury that they would decide the case solely on the facts presented and were not to rely upon the argument of counsel. There is no demonstration that the jury ignored this clear directive. See *Lanni* v. *Wyer*, 219 F.2d 701 (2d Cir. 1955), affirming a verdict in a case where counsel's argument was clearly inflammatory, certainly more so than the comments cited here.

POINT IV

The Trial Court did not commit error in denying plaintiff's requests to charge.

The plaintiff submitted thirteen requests to the Court for charges. Plaintiff raised no objections to the Court's rulings on Nos. 12 and 13. Of the five remaining ones which were refused, while the judge's charge did not specifically follow the requests by counsel, he did set forth to the jury the basis of the plaintiff's case. As this Court has stated in *Oliveras* v. *United States Lines Company*, 318 F.2d 890, 892 (2d Cir. 1963):

> "But the court is not required to give instructions in the language and form requested. If the charge as given is correct and sufficiently covers the case so that a jury can intelligently determine the questions presented to it, the judgment will not be disturbed because further amplification is refused (citations omitted). Our appellate function is to satisfy ourselves that the instructions, taken as a whole and viewed in light of the evidence, 'show no tendency to confuse or mislead the jury with respect to the principle of law applicable'."

See also *Franks* v. *United States Lines Company*, *supra*; *United States* v. *Tourine*, *supra*. A review of the complete charge shows that plaintiff's position here was fully and accurately presented to the jury by Judge Levet, and certainly cannot be construed as, in any way, confusing or misleading the jury on the applicable law.

POINT V

The Trial Court did not manifest prejudicial bias against appellant and his counsel throughout the trial.

This point is really intermingled with the issues raised in Point I. Here again, appellant has selected a group of quotations to attempt to demonstrate what he believes to be prejudicial conduct on the part of Judge Levet. Also, again as in Point I, the Court's statements must be interpreted in the context of the entire transcript. It is submitted that such a review will demonstrate that there was no bias as claimed. With regard to the judge's comments to the plaintiff's counsel concerning the volume of his voice, such remarks clearly are not unusual and should not reasonably result in any finding of bias. See *National Aviation Underwriters, Inc.* v. *Fischer*, 386 F.2d 582 (8th Cir. 1967). As noted in the discussion on Point I, there is no basis for reversing this decision because the Court was trying to expedite the trial which extended for more than a week as it was. Whether or not plaintiff agreed with some of the remaining comments, they do accurately reflect the law and do not show any prejudicial bias, or the absence of judicial impartiality. Many of them occurred after the Court had ruled adversely to plaintiff's requests and the Court was insisting correctly that counsel should not reargue the same point. As this Court has recently stated, "Adverse rulings, standing alone, do not establish judicial bias or prejudice." *United States* v. *Schwartz*, 535 F.2d 160 (2d Cir. 1976).

A review of the entire transcript shows that the Court intentionally held conferences with counsel in chambers, not in the presence of the jury, in an attempt to resolve what appeared to be obvious problems in future procedure and to attempt to ensure that matters such as the hypo-

thetical question could be presented to the witness without the need for argument and adverse rulings by the Court in the presence of the jury. The fact that plaintiff's counsel did not always take the Court's advice can hardly be used to show bias against the plaintiff on Judge Levet's part.

In summary this case is similar to that of *DiBello* v. *Rederi A/B Svenska Lloyd*, 371 F.2d 559 (2d Cir. 1967) in which the primary contention of the appellant was that he was denied a fair trial because Judge Levet failed to preserve an atmosphere of impartiality. In that case the Court stated, at 561:

> The record also fails to indicate any pattern of hostility toward DiBello. The fact that Judge Levet made a great many more adverse rulings against appellant than appellee, indicates, in this case, that the requests and objections by appellant were not sound, rather than that the judge was biased. Nor is there any merit to DiBello's contention that the judge was generally argumentative or demeaning to appellant, his witness or his counsel. If, on rare occasion, Judge Levet's remarks might better have been left unsaid, they were but separate and isolated instances, in-sufficient to contaminate the free air of an impartial tribunal or to necessitate reversal. (Citations omitted.)

It is submitted that the above statement by Judge Kaufman is a perfect reflection of the record in this case.

CONCLUSION

The decision of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

Julia M. Fletcher , being duly sworn, deposes and says;
that deponent is not a party to this action and is over 18 years of age.
That on the 23d day of August 1976, deponent served the within

Brief for the Third-Party Defendant-Appellee, United States of America,

upon the attorney(s) for the parties

by depositing a true copy thereof securely enclosed in a franked wrapper, in a post office box regularly maintained by the United States Post Office Department at 26 Federal Plaza, in the Borough of Manhattan, City of New York, addressed to said attorney(s) as follows:

Shapiro & Somer, 1557 Straight Path, Wyandanch, N.Y. 11798
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that being the address~~es~~ designated by said attorney(s) for that purpose.

Julia M. Fletcher
Julia M. Fletcher

Sworn to before me this
23 day of August, 1976.
Edwin Weiss

EDWIN WEISS
Notary Public, State of New York
No. [illegible]
Qualified in Westchester County
Commission Expires March 30, 19[illegible]